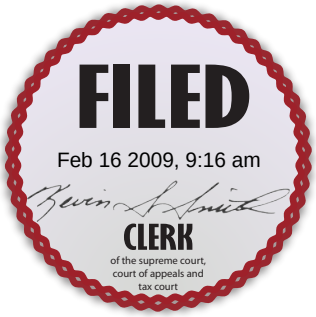

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IN THE
COURT OF APPEALS OF INDIANA

D. B.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0808-JV-711
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Geoffrey Gaither, Magistrate
Cause No. 49D09-0803-JD-687 & 49D09-0803-JD-919

February 16, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

D.B. appeals an adjudication finding him to be delinquent for acts that would be theft[1] and auto theft[2] as class D felonies if committed by an adult. D.B. raises two issues, which we revise and restate as whether the evidence is sufficient to sustain D.B.'s adjudications. We affirm in part, reverse in part, and remand.

The relevant facts follow. On January 23, 2008, Michael Rush reported a burglary at his home in Marion County and reported that his Wii video game system had been stolen. That same day, D.B. gave Donovan Stewart a Nintendo Wii and asked Stewart to pawn it for him because D.B. was only sixteen years old. Stewart pawned the Wii for D.B. and gave the money to D.B.

On February 12, 2008, Lori Rubesha started her car, a 2004 Pontiac Grand Am, to warm it up and went back inside to gather her things. When she went back outside, her car was missing, and she reported her car stolen. On March 6, 2008, Indianapolis Police Officer Chris Cavanaugh responded to a call regarding a possible stolen vehicle. Officer Cavanaugh confirmed that the vehicle was stolen and watched the vehicle for awhile because it was not occupied. D.B. entered the vehicle with another person. The police initiated a traffic stop after D.B. drove away. D.B. did not have a driver's license or registration for the car. Officer Cavanaugh told D.B. that he was under arrest for auto theft and for operating a vehicle having never received a license. D.B. stated that he did

[1] Ind. Code § 35-43-4-2 (2004).

[2] Ind. Code § 35-43-4-2.5 (2004).

not steal the vehicle and that he had bought it for fifty dollars from a "crack head." Transcript at 17.

Under cause number 49D09-0803-JD-687 ("Cause #687"), the State filed a petition alleging that D.B. was delinquent for acts that would be the following offenses if committed by an adult: auto theft as a class D felony; criminal trespass as a class A misdemeanor; and unlawful entry of a motor vehicle as a class B misdemeanor. Under cause number 49D09-0803-JD-919 ("Cause #919"), the State filed a petition alleging that D.B. was delinquent for acts that would be theft as a class D felony if committed by an adult.

At a hearing on the theft charge, the prosecutor asked Indianapolis Police Detective Janice Aikman what the serial numbers were that Rush provided, and D.B.'s counsel objected based upon hearsay grounds. The trial court overruled D.B.'s objection "[s]ubject to Michael Rush testifying." Id. at 65. Detective Aikman testified that the serial number on the Wii retrieved from the pawn shop matched the serial number provided by Rush. Later, the following exchange occurred during the direct examination of Rush:

> Q Okay. How do you know that that was the Wii that was taken from your home?
>
> A I gave the police, the serial number on it, cause it was on the box and then somebody tried to pawn it off and it was the same one.

Id. at 94.

Under Cause #687, the juvenile court adjudicated D.B. to be delinquent for committing the offenses of auto theft as a class D felony, criminal trespass as a class A misdemeanor, and unlawful entry of a motor vehicle as a class B misdemeanor. The juvenile court found that the offenses of criminal trespass and unlawful entry merged into the offense of auto theft and entered a true finding only to the offense of auto theft as a class D felony. The juvenile court adjudicated D.B. to be a delinquent for committing the offense of theft as a class D felony under Cause #919. The trial court also revoked D.B.'s probation under four other cause numbers. The juvenile court sentenced D.B. to the Department of Correction until D.B. reaches the age of twenty-one years.

The issue is whether the evidence is sufficient to sustain D.B.'s adjudications. When the State seeks to have a juvenile adjudicated as a delinquent for committing an act that would be a crime if committed by an adult, the State must prove every element of the crime beyond a reasonable doubt. J.S. v. State, 843 N.E.2d 1013, 1016 (Ind. Ct. App. 2006), trans. denied. In reviewing a juvenile adjudication, this court will consider only the evidence and reasonable inferences supporting the judgment and will neither reweigh evidence nor judge the credibility of the witnesses. Id. If there is substantial evidence of probative value from which a reasonable trier of fact could conclude that the juvenile was guilty beyond a reasonable doubt, we will affirm the adjudication. Id.

A. Theft

The offense of theft as a class D felony is governed by Ind. Code § 35-43-4-2, which provides that "[a] person who knowingly or intentionally exerts unauthorized

control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony." Thus, to adjudicate D.B. to be delinquent for committing an act that would be theft as a class D felony if committed by an adult, the State needed to prove beyond a reasonable doubt that D.B. knowingly or intentionally exerted unauthorized control over the Wii with the intent to deprive Rush of any part of its value or use.

The unexplained possession of recently stolen property alone is a circumstance from which a jury is entitled to draw an inference of guilt and may be sufficient to support a conviction for theft. Muse v. State, 419 N.E.2d 1302, 1304 (Ind. 1981). A theft conviction may be supported solely by circumstantial evidence. Id. The State need not prove the defendant was the same person who initially took the property of the owner. Rather, proof the defendant exerted unauthorized control over the property of another with intent to deprive is sufficient. Snuffer v. State, 461 N.E.2d 150, 155 (Ind. Ct. App. 1984).

D.B. argues that the State failed to establish that the Wii pawned by Stewart was stolen. Rush identified the pictures of the Wii, State's Exhibits 3, 4, and 5, as the Wii that was taken from his home. Rush testified that he knew that the Wii in the pictures was his Wii because he had given the police the serial number and it "was the same one."

Transcript at 94. Detective Aikman testified that Rush told her that the serial number on the Wii retrieved from the pawn shop matched the number given to her by Rush.[3]

D.B. also argues that "[e]ven if the State proved the pawned Wii was the same Wii stolen from Rush and that D.B. gave Rush's Wii to Stewart, the evidence remains insufficient with respect to the true finding in 919." Appellant's Brief at 12-13. On January 23, 2008, Michael Rush reported a burglary at his home in Marion County and that his Wii video game system had been stolen. That same day, D.B. gave Donovan Stewart a Nintendo Wii and asked Stewart to pawn it for him because D.B. was only sixteen years old. Stewart pawned the Wii for D.B. and gave the money to D.B. We conclude that evidence of probative value exists from which the juvenile court could have found that D.B. knowingly or intentionally exerted unauthorized control over the Wii with the intent to deprive Rush of any part of its value or use. See, e.g., Allen v. State, 743 N.E.2d 1222, 1231-1232 (Ind. Ct. App. 2001) (holding that the defendant's

[3] D.B. argues that "[t]he trial court's ruling makes clear that it would admit Detective Aikman's testimony regarding the serial numbers given to her by Michael Rush only if Michael Rush testified to those serial numbers." Appellant's Reply Brief at 4. D.B. also argues that "when Michael Rush failed to identify the serial numbers of the Wii, the condition imposed by the trial court for admission of Detective Aikman's testimony regarding the serial numbers was left unmet." Id. D.B. did not argue to the trial court that Detective Aikman's testimony should be excluded because Rush's testimony did not meet its requirement. We acknowledge that D.B.'s counsel stated in closing argument, "And I also don't believe there was any testimony by the victim regarding the actual serial number. He looked at the photos and said, 'Yeah, that's my system.' But there wasn't any specific testimony regarding what his system's serial number is and whether they match and so forth. So I also don't think there's enough there Judge." Transcript at 97-98. However, D.B.'s counsel did not specifically argue that Detective Aikman's testimony should be excluded because Rush's testimony did not meet its requirement. Thus, we conclude that D.B. waived this argument. See Kellett v. State, 716 N.E.2d 975, 981 (Ind. Ct. App. 1999) (holding that a specific and timely objection must be made in order to preserve for appeal a claim of error in the admission of evidence). Waiver notwithstanding, the trial court's comments did not require Rush to testify to a specific serial number. We conclude that Rush's testimony that he had given the police the serial number and it "was the same one" met the trial court's requirement. Transcript at 94.

possession of stolen items within twenty-four hours of a burglary was sufficient to sustain the defendant's conviction of theft), reh'g denied, trans. denied.

B. Auto Theft

The offense of auto theft as a class D felony is governed by Ind. Code § 35-43-4-2.5, which provides that "[a] person who knowingly or intentionally exerts unauthorized control over the motor vehicle of another person, with intent to deprive the owner of . . . the vehicle's value or use . . . commits auto theft, a Class D felony."[4] Thus, to adjudicate D.B. to be a delinquent for committing an act that would be auto theft as a class D felony if committed by an adult, the State needed to prove beyond a reasonable doubt that D.B. knowingly or intentionally exerted unauthorized control over Rubesha's vehicle with the intent to deprive Rubesha of the vehicle's value or use.

As previously mentioned, the unexplained possession of recently stolen items provides support for an inference of guilt of theft of that property. Muse, 419 N.E.2d at 1304. "[P]ossession remains unexplained where the trier of facts rejects the explanation as being beyond a reasonable doubt." Gibson v. State, 533 N.E.2d 187, 188 (Ind. Ct. App. 1989) (citing Ward v. State, 260 Ind. 217, 294 N.E.2d 796 (1973)). "[W]here any considerable length of time has elapsed from the time of the theft to the time of the arrest there must be some showing that defendant has had the exclusive possession of the

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[4] The charging information alleges that "[o]n or about the 6th day of March, 2008, [D.B.] did knowingly or intentionally exert unauthorized control over the motor vehicle of Lori Rubesha, that is: a 2004 Pontiac, with the intent to deprive the owner of its value or use." Appellant's Appendix at 17.

property during that period of time." Muse, 419 N.E.2d at 1304. "In cases where the defendant is found to be in possession of property which has not been recently stolen, and there has been no showing of exclusive possession of the property during the relevant time frame, this court may also consider additional evidence tending to support the defendant's conviction." Shelby v. State, 875 N.E.2d 381, 385 (relying upon Gibson v. State, 533 N.E.2d 187, 189-190 (Ind. Ct. App. 1989)), trans. denied. Both exclusive possession of stolen goods and knowledge that they were stolen may be proven by circumstantial evidence. Muse, 419 N.E.2d at 1303-1304. Consequently, in addition to the above elements that the State must prove, if a considerable length of time elapsed from the time of the theft to the time of the arrest, the State must also show that D.B. had exclusive possession of the property or additional evidence tending to support the defendant's conviction. See Muse, 419 N.E.2d at 1304; Gibson, 533 N.E.2d at 189-190.[5]

To determine whether a considerable length of time elapsed or the property was recently stolen, we must examine the length of time between the theft and possession as well as circumstances such as the defendant's familiarity or proximity to the property at

[5] We note that in Shelby v. State, 875 N.E.2d 381, 384 (Ind. Ct. App. 2007), trans. denied, the State argued that the defendant's mere control over what he likely knew to be a stolen car was adequate to sustain a conviction for auto theft. The State pointed to Gibson v. State, 533 N.E.2d 187, 189-90 n.2 (Ind. Ct. App. 1989), wherein a panel of this court indicated in dicta that the circumstantial evidence which sustained a conviction for auto theft could arguably also sustain a conviction for auto theft charged under the theory that the defendant knew the vehicle was stolen when he drove it. 875 N.E.2d at 384. We acknowledged this dicta in Gibson and observed that a plain reading of Indiana Code § 35-43-4-2.5 would not discourage the State's theory. Id. However, we declined to accept the State's theory because we were unable to reconcile the State's theory with the "the longstanding rule as articulated in Muse v. State, 419 N.E.2d 1302, 1304 (Ind. 1981), requiring, for purposes of supporting a theft conviction in cases of considerable lapses of time, a showing that the defendant had exclusive possession of the stolen property during the period of time since the theft occurred." Id.

the time of the theft and the character of the goods. Shelby, 875 N.E.2d at 385 (relying upon Gibson, 533 N.E.2d at 188-89). Here, there was a delay of twenty-three days between the theft of the vehicle and D.B.'s arrest. D.B.'s possession of the vehicle cannot be characterized as recent. See Shelby, 875 N.E.2d at 386 (holding that the fifteen-day delay between the theft of the vehicle and the defendant's possession of it could not be characterized as recent); Buntin v. State, 838 N.E.2d 1187, 1191 (Ind. Ct. App. 2005) (holding that the facts did not support the conclusion that the vehicle was recently stolen property when it was discovered five days after being stolen). D.B.'s adjudication therefore may not be sustained on the mere fact of his possession or exercise of control over the vehicle. See Shelby, 875 N.E.2d at 386.

Because D.B.'s possession of the vehicle cannot be characterized as recent, there must be some showing that D.B. had the exclusive possession of the property during that period of time or there must be additional evidence tending to support his adjudication. See Muse, 419 N.E.2d at 1304; Shelby, 875 N.E.2d at 385 (relying on Gibson, 533 N.E.2d at 189-190). In Muse, the defendant was found in possession of a stolen van three weeks after the theft, but there was evidence to support an inference that Muse had possession of the van shortly after the theft. Muse, 419, N.E.2d at 1304. Specifically, the glove compartment contained a rent receipt and food vouchers dated some time before the arrest, all in the defendant's name. Id. The evidence also supported an inference Muse knew the van was stolen. Id. Specifically, the registration certificate of the owner was in the glove compartment and the original license plate had been removed and placed

under the seat. Id. In Gibson, we held that the defendant's conviction could not be sustained based solely upon his unexplained possession of the vehicle two days after it was stolen. 533 N.E.2d at 189. However, we affirmed Gibson's conviction because we found corroborating evidence supporting it. Specifically, Gibson possessed a screwdriver to operate the busted ignition, refused to identify himself upon request, and stated that he had not been in the vehicle even though a police officer had watched him enter the vehicle and drive away. Id.

Here, the State points out that D.B. had the keys when he was arrested and argues that "the victim testified that the vehicle was stolen out of her driveway when it was running, indicating that the thief would have the keys." Appellee's Brief at 7. We cannot say that the fact that D.B. had the keys is dispositive. The State also points out that D.B. did not have the registration and alleged that he purchased the vehicle from a "crack head" for fifty dollars, which the State suggests is an implausible explanation. Appellee's Brief at 8. We cannot say that D.B.'s explanation provides sufficient evidence. See Trotter v. State, 838 N.E.2d 553, 558 (Ind. Ct. App. 2005) (declining the State's invitation "to hold an 'implausible explanation' may serve as evidence to corroborate 'unexplained possession' of stolen property"). The State provided no evidence suggesting that D.B. exclusively possessed the vehicle from the time it was stolen. The record does not reveal that there were any items in the vehicle that had any demonstrable connection to D.B. Under the circumstances, we cannot conclude that a reasonable trier of fact could find D.B. guilty of auto theft beyond a reasonable doubt.

See, e.g., Shelby, 875 N.E.2d at 386 (holding that the evidence was insufficient to support the defendant's conviction for auto theft when the vehicle was stolen fifteen days before the defendant was discovered exercising control over it and the State made no showing that the defendant exclusively possessed the vehicle during the period of time since the theft); Buntin, 838 N.E.2d at 1191 (holding that the evidence was insufficient to support the defendant's conviction for auto theft because the facts did not support the conclusion that the vehicle was recently stolen property or the inference that the defendant committed the actual theft of the vehicle); Trotter, 838 N.E.2d at 558 (holding that the evidence was insufficient to support the defendant's conviction for auto theft when the theft was not recent and the State provided neither evidence of exclusive possession after the theft as in Muse v. State, 419 N.E.2d 1302 (Ind. 1981), nor additional corroborating evidence such as that found to support the conviction in Gibson v. State, 533 N.E.2d 187 (Ind. Ct. App. 1989)).

"Generally, we may order a modification of a conviction to that of a lesser included offense because of the insufficiency of evidence on a particular element of a crime." A.H. v. State, 794 N.E.2d 1147, 1151 (Ind. Ct. App. 2003). Because the crime of conversion may be established by proof of less than all the material elements of auto theft, it is an inherently lesser included offense. See Wright v. State, 658 N.E.2d 563, 566 (Ind. 1995). Conversion is governed by Ind. Code § 35-43-4-3 (Supp. 2005), which provides that "[a] person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion, a Class A misdemeanor."

"A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind. Code § 35-41-2-2(b) (2004).

D.B. argues that the State failed to prove that he committed an act that would constitute conversion if committed by an adult. Specifically, D.B. argues that the State failed to prove that he knowingly exerted unauthorized control over property of another person because "[t]he mere fact that D.B. obtained an excellent deal on the vehicle does not establish that D.B. knew it was stolen." Appellant's Reply Brief at 3.

Here, Rubesha testified that she never gave D.B. permission to drive her vehicle. D.B. did not have the registration for the vehicle when he was arrested. D.B. claimed that he bought the 2004 Pontiac Grand Am for fifty dollars from a "crack head." Transcript at 17. Based upon the record, we conclude that evidence of probative value exists from which the juvenile court could have found that D.B. knowingly or intentionally exerted unauthorized control over Rubesha's vehicle. We remand to the juvenile court to enter a true finding for conversion, a class A misdemeanor if committed by an adult. In so doing, the juvenile court may revise its dispositional order consistent with this opinion and with applicable law.

For the foregoing reasons, we affirm D.B.'s adjudication for committing acts that would constitute theft as a class D felony if committed by an adult, reverse D.B.'s adjudication for committing acts that would constitute auto theft as a class D felony if

committed by an adult, and remand to the trial court to enter a true finding for conversion, a class A misdemeanor if committed by an adult.[6]

Affirmed in part, reversed in part, and remanded.

ROBB, J. and CRONE, J. concur

[6] D.B. argues that if the true findings in Cause #687 and Cause #919 are reversed, then the trial court's findings that D.B. violated his probation under four other cause numbers must be reversed. However, D.B. did not appeal the revocations under those cause numbers and appealed only his adjudications under Cause #687 and Cause #919. Thus, we will not address D.B.'s arguments.